80-1062

Supreme Court, U.S.
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NO _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1980

MARJORIE ANN SHIELDS,

Petitioner

v.

UNITED STATES NATIONAL
BANK OF OREGON,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OREGON

MARJORIE ANN SHIELDS
9432 North St. Louis
Portland, Oregon 97203
286-5662 PETITIONER-IN PROPRIA PERSONA

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QUESTION PRESENTED

In the case of a standard universal bank contract involving a savings account of joint tenants with right of survivorship has the Petitioner been denied due process of law in a court granting Respondent's motion for summary judgment whereby Petitioner was precluded from litigating the issue of Respondent Bank's contractual duty to Petitioner created by the savings account with Petitioner when the allowance of the summary judgment was based on a prior judgment in an action involving the parties as co-defendants and in which the contractual issue and duty was not litigated.

A caption of the case in this Court contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

Marjorie Ann Shields, Petitioner vs. United States National Bank of Oregon, Respondent.

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OPINION BELOW

The judgment without opinion of the Court of Appeals of the State of Oregon is reported at Or App 80 Adv Sh 807. No opinion was rendered by the Supreme Court of the State of Oregon in denying discretionary review.

Grounds on which the jurisdiction of this Court is involved:

A summary judgment was granted in the Circuit Court of the State of Oregon for the County of Multnomah on September 12, 1979.

The judgment was affirmed in the Court of Appeals of the State of Oregon on June 30, 1980.

The Supreme Court of the State of Oregon refused to grant a Petition for Review on September 3, 1980.

United States Constitutional Provision Involved:

AMENDMENT XIV, United States Constitution "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Since a motion for summary judgment was allowed in this matter without a trial the transcript does not recite the facts involved in the case.

As the facts appear in the court record in the parties' memoranda on the motion for summary judgment the facts

may be summarized as follows:

On August 3, 1953 Ricky Dale Shields, who was 11 years of age, and his mother, Marjorie Ann Shields, Petitioner herein, opened a bank account in the joint names of Ricky Dale Shields and Marjorie Ann Shields, with the United States Bank of Oregon, Respondent.

The bank account contract between Ricky Dale Shields and Marjorie Ann Shields and the Bank provided:

(1) "All transactions are governed by contract on Bank's forms, including savings passbook rules if applicable, and account is subject to Bank's services charges existing at anytime.

(2) Deposits credited to this account are payable by Bank to or upon the order of any of undersigned or to the survivor, and

upon death shall belong to the survivor, but payable only upon compliance with legal requirements."

A copy of the bank account contract relating to joint account number 49755 of Ricky Dale Shields and Marjorie Ann Shields is attached hereto (A33).

On January 4, 1970, Ricky Dale Shields died intestate at the age of 28, without having altered the ownership of the joint bank account with right of survivorship with his mother, Petitioner. After the death of Ricky Dale Shields, Petitioner demanded from Bank the funds in the joint account with right of survivorship. Bank refused to pay the money in the account to Petitioner and Petitioner claims that the balance in the account, plus the accrued interest is now due and owing to Petitioner from Bank.

At his death, Ricky Shields left a widow and two children. His widow, Lola Shields, was appointed personal representative of the Estate of Ricky Shields.

Two years after Ricky Shields' death and after Petitioner had demanded the funds in her joint bank account with right of survivorship from Bank and been denied the funds Ricky Shields' widow, Lola Shields, the personal representative of her husband's estate, filed suit for a declaratory judgment to have determined the ownership of the funds deposited in the joint savings account with right of survivorship between Ricky Shields and Marjorie Shields to which bank account Lola Shields was not a party.

Judge Richard Van Hoomissen, pro tempore, of the Circuit Court of Multnomah County, Oregon found for the personal representative of the estate of

Ricky Shields. That case was appealed to the Supreme Court of Oregon. Shields v. United States National Bank of Oregon and Shields, 266 Or. 561, 514 P.2d 348, (1973).

The bank account signature card which contained the contractual agreement between Ricky Shields, Marjorie Shields and Bank was not introduced into evidence at that trial nor was that contractual agreement considered by the court.

That court, also, made no finding of fact regarding the contract entered into between Petitioner and Bank.

The declaratory judgment suit before Judge Van Hoomissen, is the basis upon which Bank moved for and was granted the summary judgment which judgment is on appeal before this Court. Judge Van Hoomissen's findings of fact, conclusions

of law and judgment appear in the appendix (A25).

Petitioner has been damaged in the sum of $15,287.45 plus interest which sum represents the balance in the savings account which Bank refused to pay to Petitioner and which refusal resulted in the breach of contract suit filed in Multnomah County Circuit Court.

SUMMARY OF ARGUMENT AND REASONS FOR GRANTING THE WRIT

The Supreme Court of the State of Oregon in Shields v. U.S, National Bank of Oregon and Shields, 266 Or 561, 514 P.2d 348 (1973) ruled upon the ownership of a jointly held bank account without the bank account contract or account signature card having been introduced into evidence.

Joint bank accounts with survivorship provisions are held throughout the

United States and are one of the foundations of the capitalist society. Yet, the 1972 case that instigated this suit which resulted in the summary judgment herein held that where there is a presumption of survivorship in a joint bank account this may be overriden by other evidence even though the bank account contract itself, which was the basis of the joint account, was never introduced into evidence.

The Court of Appeals and Supreme Court of the State of Oregon have affirmed a motion for summary judgment apparently based upon the Respondent's argument that the Petitioner's claim is barred by prior litigation.

The due process clause of the United States Constitution provides that no State shall deprive any person of property without due process of law. Pet-

itioner's only remedy in this case must come from the judicial process outside of the State of Oregon since the courts in Oregon refuse to reverse a position taken that was based upon insufficient evidence having been presented for the court's consideration. The failure to introduce this evidence was the fault of the respondent-Bank who was a party to the 1972 suit and had the joint bank account contract in its possession.

The Constitution of the United States was adopted to "establish Justice." A position by this Court appears warranted in this case to insure petitioner receives justice.

ARGUMENT

Petitioner should be allowed to litigate in this case the rights and duties flowing from the contract she had entered into with her now deceased son,

and Respondent Bank.

Petitioner is entitled to the due process of law under the Unites States Constitution and is also entitled equal protection under the Federal Constitution with respect to the contract entered between Petitioner, her son, and the Bank. The Fourteenth Amendment to the Constitution, section one, also forbids the deprivation of property without due process of law. Wright v. Hart, 182 N.Y. 330, 75 N.E. 404 (1905).

Respondent's position that "plaintiff's claim has already been fully litigated and is barred by the doctrine of collateral estoppel," is without legal justification.

Respondent Bank relied upon a 1972 suit filed by Lola Shields, the widow of Ricky Dale Shields, against Marjorie Ann Shields and the United States National

Bank of Oregon in claiming that "the allegations comprising the claim have been previously adjudicated."

The case that Bank relied upon was appealed to the Supreme Court of Oregon, Chief Justice O'Connell stated in the opinion, "The only exhibits introduced were three passbooks covering the years 1953 through 1969. No account signature was produced." Shields v. U,S, National Bank of Oregon and Shields, 266 Or. 561, 564, 514 P.2d 348 (1973). The court further stated, "No survivorship provision appears on the face of the passbook introduced into evidence and no other evidence was adduced at trial which indicates that the account contract included a survivorship agreement." Ibid, page 564. The Supreme Court phrased the issue, "The only question is whether, IN THE ABSENCE OF AN EXPRESS

SURVIVORSHIP AGREEMENT, a right to the fund accrued to the defendant upon Ricky's death." Ibid, page 564. (Emphasis added)

The issue of whether Marjorie Shields was entitled to the money in the savings account as the result of her contractual agreement with the Bank, which agreement included her joint interest with her son in the account, which account also included a survivorship agreement, was neither considered nor decided by the court which Respondent herein relied upon. (See A33 for the contract between Petitioner and Respondent and the survivorship agreement therein.)

The fact that this contractual claim was not previously adjudicated is further evident from the Findings of Fact, Conclusions of Law and Judgment in that 1972 case (A25), wherein finding of fact number six, the judge clearly states

that the trial court there determined the present Petitioner claimed the funds in the joint account "as a trustee for the benefit of the minor children of her son" and not pursuant to a contract with the Bank.

The findings and opinions of trial and appellate courts which decided the prior litigation make it clear, then, that the contractual issue upon which the present litigation is based has never been adjudicated. In such a case, collateral estoppel cannot be invoked to preclude adjudication in the case at bar:

> "Where a valid and final personal judgment is rendered in an action to recover money, the judgment is conclusive between the parties, except on direct attack, to the following extent:.... (c) whether the judgment is in favor of the plaintiff or of the defendant, it is conclusive in a subsequent action between them upon the issues actually litigated in the action." Restatement, Judgments, Section 45 (1942) (Emphasis added).

This Restatement characterization of the required foundation of issue preclusion by means of collateral estoppel has been accepted by later authorities, and put in practice, since its codification in 1942. As stated in 4 Witkin, California Procedure, Section 220(2d ed. 1971), the rule is that "where the issue was not raised in the prior proceeding the basic requirement for collateral estoppel is absent, and a judgment, whether rendered after trial, or by default, is not conclusive on it." (Citing further authorities at page 3355)

Though it has been suggested that the "actual litigation" prerequisite to applying collateral estoppel may be of doubtful soundness, it has generally been accepted as necessary to preclusion by collateral estoppel of an issue arising in subsequent litigation between

parties. (See 65 Harvard Law Review 818, 840 (1952), and authorities cited in footnote 162.)

Furthermore, Petitioner's failure to raise her claim by means of introduction of the contract in the prior action should not be deemed to preclude her from doing so in this case, even though similar issues may be involved.

> "Although it is not unfair to the losing party to hold that any question of fact actually determined in the action shall be conclusive against him in a subsequent action between the parties based upon a different cause of action, it would be unfair to him to hold that he is precluded from relying on facts which might have been but were not determined in the prior action." Restatement, Judgments, Section 68, comment "d", 1942.

The Respondent's position in the prior adjudication also mitigates against allowing it to assert collateral estoppel in this action.

In the action by the personal representative against both Petitioner and the Bank, the latter characterized its position as neutral, and did not, in fact, take part in the proceeding (Excerpt from Transcript, A30). Taking such a position amounted to a betrayal by the Bank of its relationship to Petitioner, with whom it had entered into the contract which is the subject of this suit.

Petitioner opposed to Bank's request to withdraw to a position of a neutral party, and argued that it "should join in enforcing the law of joint bank accounts" (A32).

From Petitioner's point of view, the Bank clearly misrepresented its legal relationship to her, and cannot now insist that her claim fails for lack of presentation in the prior case: "Since the requirement of singleness of presen-

tation of a claim is in large measure, for the benefit of the defendant, preclusion against splitting a claim should have no application in a situation involving fraud or misrepresentation by the defendant in the action." A.D. Vestal, "Res Judicata/Preclusion," 97 (1969).

Under these circumstances, the Bank should be estopped from arguing that Petitioner's claim has been fully litigated, since failure to fully litigate the claim is due to the Bank's withdrawal from active participation in derogation of its contractual responsibility. It should not now benefit from its own wrongdoing.

Another barrier to Bank's assertion of collateral estoppel is raised due to its assumption in the prior case of a passive, non-adversary role. The Bank

cast itself in a mere formal, nominal position, and, as such, eschewed the identity of parties required to now assert preclusion of the contract issue, for "it has been widely held that there is no preclusion between nonadverse parties, and this is the position which has been adopted by the Restatement of Judgments." A.D. Vestal, supra, page 282 (footnotes omitted).

This rule is principally illustrated "where the plaintiff and defendant in the second action were merely codefendants in the original action; ordinarily they were not on 'opposite sides,' and the judgment was not rendered 'between them.'" 4 Witkin, supra, Section 223, page 3357 (citations omitted).

Respondent contends that if for no other reason, Petitioner's contractual claim is barred by the statute of limi-

tations. This is patently absurd.

The joint bank account with right of survivorship between Ricky Shields, Marjorie Shields and Bank came into existence on August 3, 1953. Ricky Shields died intestate on January 4, 1970 at the age of 28 with the bank account never having been altered. In 1972 the widow of Ricky Shields filed the declaratory judgment suit as personal representative of the Estate of Ricky Shields in the Circuit Court of Multnomah County, Oregon.

On October 19, 1972 that court, without the joint account contract having been introduced, determined that the funds in the joint account with right of survivorship belonged to the Estate of Ricky Shields.

Up to that point in time Bank would argue that it had not breached its

contractual agreement with Petitioner.

On January 3, 1974 Bank paid the balance then in the savings account, $18,142.28, which figure included interest, to Lola Shields, the personal representative of the Estate of Ricky Shields. Up to the moment of payment, while the Bank may have breached its contract, the Petitioner had not been damaged and did not have a breach of contract suit against Bank until damaged.

The payment of the funds by Bank to the Estate of Ricky Shields was 14 months after the finding by Judge Van Hoomissen that the funds belonged to the Estate of Ricky Shields and such finding was not a proper basis for granting a summary judgment based upon collateral estoppel or any other grounds because Petitioner's cause of action did not come into existence until Petitioner was damaged

which was on January 3, 1974 when Bank paid Petitioner's funds to Lola Shields, the personal representative of the Estate of Ricky Shields and which payment was made over the strenuous objections of Petitioner who claimed the funds pursuant to her contract of the survivorship account with the Bank. The subject suit was filed June 19, 1978 and well within the statute of limitations for contracts.

Petitioner herein and her decedent son had entered into a contract with the United States National Bank of Oregon. The Bank had a positive contract duty to pay the balance of the savings account to the survivor. There was no justification for the Bank to refuse to comply with its contract obligations and require the survivor to go to court to contest the spurious claim of another. Petitioner is entitled to a legal determination of

her rights under that contract which Petitioner has not received to this point in time and which she seeks to receive as a result of Petitioner's suit filed herein against Bank.

Bank's motion for summary judgment relied upon Bahler v. Fletcher, 257 Or. 1, 61, 474 P.2d 329 (1970), wherein the court stated, "The doctrine of judicial finality, of which collateral estoppel is a part, is based upon two considerations. First, the protection of private litigants against the harassing necessity of litigating more than once the same issue or cause of action; and, second, the protection of the public's interest in preventing relitigation of matters once decided."

Regarding the first consideration above, in 1972 suit was filed by Lola Shields against the United States

National Bank of Oregon and Marjorie Shields. Marjorie Shields filed an answer and cross complaint. The United States National Bank of Oregon never filed an appearance in that case nor did they make an appearance in the case. The Bank did not even deny any of the allegations set forth in the cross complaint of Marjorie Shields, nor did the Bank file an interpleader. In other words, in the 1972 suit the Bank did not litigate anything.

Regarding the second consideration, the court never made a determination of the rights of the parties pursuant to the contract entered into between Ricky Dale Shields, Marjorie Ann Shields and the Bank because the Bank never presented the contract, which it had in its possession, to the court for consideration.

Bank further relied upon the

language in Ira v. Columbia Food Co., 226 Or. 566, 360 P.2d 622 (1961), wherein the court stated, " . . . the judgment is conclusive as to issues raised in the subsequent action IF THOSE ISSUES WERE ACTUALLY LITIGATED AND DETERMINED", (Emphasis added) They were not litigated. Petitioner should be entitled to her day in court and due process and equal protection under the United States Constitution and Petitioner's rights under the contract between Ricky Dale Shields, Bank and the Petitioner herein should be resolved.

Respondent has invoked the doctrine of res judicata in its argument on appeal, though at the trial below it characterized the preclusion issue as one of collateral estoppel. Whether one views the issue in terms of collateral estoppel or res judicata, however, the Respondent's

argument should fail.

It has been recognized that preclusion should not be strictly applied, though otherwise technically appropriate, when overriding equitites and ccnsiderations of public policy dictate otherwise.

> "Decisions...demonstrate that res judicata, as an embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other public policies." Spilker v. Hankin, 188 F2d 35, 38-39 (D.C. Cir. 1951)

The public policy which in this case mitigates against a strict application of preclusion is based upon the contractual relationship between the Bank and Petitioner.

The Bank characterizes itself as a neutral stakeholder in the prior litigation and argues that Petitioner merely assumes that this amounts to a derogation of Bank's contractual responsibility

(Resp. Br., page 13). Petitioner answers that one cannot enter into a contract, accept its benefits, and later deny that the contract exists. The declaration of neutrality by the Bank in the prior litigation amounted to a denial of the existence of the survivorship account agreement between Petitioner and the Bank. In effect, the Bank declared that it had no interest in abiding by the contract it had entered into with Petitioner.

The issue of whether Marjorie Shields was entitled to the money in the savings account as the result of her contractual agreement with the Bank, which agreement included her joint interest with her son in the account, which account also included a survivorship agreement was neither considered nor decided by the court which Respondent herein relied upon. (See A33 for the contract between

Petitioner and Respondent and the survivorship agreement therein.)

This denial by the Bank contravenes the general public interest in the enforcement of rights under contract, and the specific public interest in encouraging savings accounts by recognizing under law the joint tenancy in bank accounts with the incidental rights of survivorship. This Bank's denial of its contractual duty to Petitioner also undermines the general public interest in the fulfillment of fiduciary duties by banks,

Moreover, it has been recognized that one may be estopped from questioning the validity of a contract by accepting benefits thereunder. Meads v. Stott, 193 Or 509, 238 P2d 256 (1952), Swint v. Swint, 238 Or 367, 395 P2d 114 (1964).

The Bank's claim of neutrality in the prior adjudication was inequitable

and unconscionable. This court should not perpetuate that inequity.

> "/I/n rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy." Greenfield v. Mather, 32 Cal. 23, 35, 194 P2d 1, 8 (1948).

Petitioner contends that hers is that rare case where the policy underlying preclusion of litigation should yield to the ends of justice, a hearing on her contract claim, which she so far has not been afforded, and the important consideration of the policy of mutual responsibility in contracts establishing joint tenancy in savings accounts with survivorship rights.

CONCLUSION

Precluding the Petitioner her right to litigation of the joint account bank

contract issue amounts to a deprivation of due process of law. Petitioner is entitled to the due process of law under the United States Constitution and is also entitled to equal protection between Petitioner, her son, and the Bank.

A writ of certiorari should issue to review the summary judgment which was issued without opinion by the Court of Appeals of the State of Oregon and affirmed by the Supreme Court of Oregon.

Respectfully submitted,

Marjorie Ann Shields
Marjorie Ann Shields
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In Propria Persona

APPENDIX

On June 17, 1978, Petitioner filed her complaint. After three demurrers and a motion were filed against Petitioner's original and two amended complaints, this case was at issue in the Circuit Court of Multnomah County:

IN THE CIRCUIT COURT OF OREGON

FOR MULTNOMAH COUNTY

MARJORIE ANN SHIELDS, Plaintiff v. UNITED STATES NATIONAL BANK OF OREGON, Defendant	No: A7806-09923 THIRD AMENDED COMPLAINT

Petitioner's cause of action was stated as follows:

I

Plaintiff is a resident of the County of Multnomah, State of Oregon. Defendant is a national banking corporation, feder-

ally chartered, and engaged in the banking business and has a place of business in Multnomah County, Oregon.

II

On or about the third day of August, 1953, the plaintiff, Ricky Dale Shields, and the defendant entered into a contract, the terms of which insofar as they are material herein are and were at all material times herein as follows:

"Undersigned agree with each other and with the United States National Bank of Portland (Oregon), irrevocably except by joint written notice filed with Bank, as to this JOINT ACCOUNT:

1) All transactions are governed by contract on Bank's forms, including savings passbook rules if applicable, and account is subject to Bank's service charges existing at any time.

2) Deposits credited to this account are payable by Bank to or upon the order of any undersigned or to the survivor, and upon death shall belong to the survivor, but payable only upon compliance with legal requirements. Without consent of any other, any of undersigned may withdraw funds from this account or transfer such funds in whole or in part to such undersigned's individual account or in payment of such undersigned's individual obliga-

tions, and all interest of all others of of undersigned shall to that extent be divested and Bank released thereby, without reference to original ownership of the moneys deposited. Undersigned authorize the signatures below in transactions affecting account and authorize each other to endorse and deposit in this account checks and other items payable to any of undersigned. Deposits received for credit to this account or for account of any of undersigned may be credited to this account though temporarily closed; subject to all terms hereof, unless otherwise directed."

III

On January 4, 1970, Rickie Dale Shields died. From August 3, 1953 up to and including January 4, 1970 and at all other material times hereto plaintiff and decedent, Rickie Dale Shields were the joint owners with right of survivorship of a certain deposit of money in the sum of $15,287.45 on deposit as a savings deposit with defendant bank, to-wit, account number 49755. Said deposit was made with defendant bank under a contract made by plaintiff, decedent and defendant

bank that all moneys at any time deposited by plaintiff and decedent or either of them in said account were to continue to be the joint property, with right of survivorship, of plaintiff and decedent and would continue to be payable to plaintiff and said decedent, or either of them, or to the survivor of them without reference to the original ownership of said moneys.

IV

Defendant bank accepted said deposits pursuant to the terms of the aforesaid contract.

V

After the death of Rickie Dale Shields and prior to the commencement of this action, on or about January 9, 1970, January 16, 1970, March 24, 1970, April 16, 1970, December 18, 1970, and March 28, 1972, plaintiff demanded and sought

assurance from defendant that funds in said account were safe and belonged to plaintiff. Defendant assured plaintiff that funds in the account belonged to plaintiff and were payable to plaintiff.

On or about October 1, 2, 3, 1973, January 16, 1976 and June 19, 1978, as well as on other dates, plaintiff demanded payment from the defendant of the full amount of the deposit pursuant to the contract set forth in paragraph III above, but defendant failed and refused and continues to fail and refuse to pay to plaintiff said deposit.

VI

Plaintiff has been damaged in the amount of $15,287.45, plus interest from January, 1970 due to the failure and refusal on or about January 3, 1974 by the defendant bank to pay the balance in

the account pursuant to the agreement entered into between plaintiff and defendant. No part of aforementioned sum has been paid to plaintiff.

VII

Plaintiff entered into a contract with defendant on August 3, 1953, which provided for the payment of attorney fees if action was brought for collection of sums owing pursuant to the contractual agreement. Plaintiff seeks to be awarded the sum of $7,500.00 on account of her attorney fees in seeking to enforce the terms of her contractual agreement with the defendant.

WHEREFORE, plaintiff prays for a judgment of this court against the defendant in the amount of $15,287.45, plus interest from January, 1970, and for attorney fees in the amount of $7,500.00 and for plaintiff's costs and disburse-

ments incurred herein.

After defendant filed its Answer with Affirmative Defenses, and plaintiff her Reply, hearing was had on August 28, 1979 on:

IN THE CIRCUIT COURT OF OREGON

FOR MULTNOMAH COUNTY

MARJORIE ANN SHIELDS, Plaintiff, v. UNITED STATES NATIONAL BANK OF OREGON, Defendant	NO. A7806-09923 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, United States National Bank of Oregon, respectfully moves the court for summary judgment on the ground that it is entitled to judgment against plaintiff as a matter of law. ORS 18.105 In addition, defendant requests an award of attorney fees in the amount of $2,500.

Defendant's motion for summary judgment was taken under advisement by the Honorable John C. Beatty, after arguments and his opinion was issued on September 12, 1979:

IN THE CIRCUIT COURT OF OREGON

FOR MULTNOMAH COUNTY

MARJORIE ANN SHIELDS, Plaintiff, v. UNITED STATES NATIONAL BANK OF OREGON, Defendant.	NO. A7806-09923 ORDER GRANTING MOTION

Defendant's motion for summary judgment came on for hearing on August 28, 1979, before the Honorable John C. Beatty Judge of the Multnomah County Circuit Court. Plaintiff appeared by John Bassett, of her attorneys; Defendant appeared by Jeffrey Michael Alden and Guy A. Randles of its attorneys. Argu-

ments were presented and legal memoranda with accompanying affidavits were submitted by respective counsel. After having taken the matter under advisement and thereafter issuing an OPINION ON MOTION FOR SUMMARY JUDGMENT, dated September 12, 1979,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is granted.

The trial court, on September 12, 1979 issued, as set forth below, its opinion:

IN THE CIRCUIT COURT OF OREGON
FOR MULTNOMAH COUNTY

MARJORIE ANN SHIELDS, Plaintiff, v. UNITED STATES NATIONAL BANK OF OREGON, Defendant.	NO: A7806-09923 OPINION ON MOTION FOR SUMMARY JUDGMENT

1. Plaintiff in her Third Amended Complaint sues defendant bank for breach of contract. She claims that by virtue of a joint bank account contract into which she and her deceased son entered in 1953 she was entitled to ownership of the proceeds of the savings account upon his death in 1970. She claims that she demanded payment, payment was refused, and she seeks recovery of the proceeds together with attorney fees.

2. Defendant in its Answer to the Complaint asserts two substantive affirmative defenses: first, failure to commence the action within the time limited by law; second, the claim is barred by previous adjudication. Defendant claims in a third affirmative defense it is entitled to recover attorneys fees pursuant to the contract.

3. Plaintiff claims in her Reply to the first affirmative defense that defendant is estopped to assert the statute of limitations. In her Reply to the second affirmative defense of prior adjudication, the plaintiff claims defendant is estopped by its conduct. Finally, plaintiff asserts the claim for attorney fees does not constitute a defense, and in any event defendant is not entitled to recover the same by virtue of its "negligence, deceit and unethical conduct."

4. All relevant documents referred to are before the court, either by attachment to affidavit or pursuant to defendant's request for admission and genuineness of documents and plaintiff's response to the request. I note that objections were made to the relevancy of certain documents, but such objection does not bear upon their genuineness. I have reviewed the arguments, the memoranda filed, and have the following opinion:

5. In 1953 plaintiff and her son Rickie Shields opened joint savings account no. 49755-2 in the United States National Bank, defendant in this case. They both signed Savings Account Contract Exhibit A. The account was in the name of Rickie Dale Shields or Marjorie Ann Shields. No change was ever made in the names on the account. In 1961 Rickie Shields was married to Lola Shields, and

two children were born to them. He died on January 4, 1970, and the balance of the account was then $15,287.45.

6. At the time of Rickie Dale Shields' death, his widow, Lola Shields, had possession of the current passbook. Her attorney made a demand upon the bank to pay the proceeds to her on March 6, 1970. The plaintiff, Marjorie Shields made a demand upon the bank to pay the proceeds to her on March 24, 1970. On February 24, 1970, Lola Shields as personal representative of the estate of Rickie Dale Shields, filed a suit for declaratory judgment in Multnomah County Circuit Court, Case No. 377-353, naming as defendants the United States National Bank and the plaintiff in this case, Marjorie Ann Shields. In that case, Lola Shields claimed that the balance in the account at the time of her marriage was

$541.37, that such money belonged to Rickey Dale Shields, and that thereafter both he and Lola Shields made continuous deposits and withdrawals up until Rickie Dale Shields' death, and that they simply failed through inadvertence to change the name on the bank account, and no part of the money in the account was contributed by Marjorie Ann Shields. Finally, Lola Shields pled that Marjorie Ann Shields claimed ownership as a joint tenant of the account because Lola Shields was not named as a depositor. The bank claimed only that it was a stakeholder and asked the court to direct disposition of the funds.

7. At the outset of the case, the plaintiff obtained a court order restraining the bank from disbursing the funds until further order of the court. That order was dated February 4, 1972.

The case was tried before Judge Van Hoomissen October 13, 1972, who signed and entered findings of fact and conclusions of law on October 19, 1972. He found plaintiff Lola Shields as personal representative of the estate entitled to the proceeds. Marjorie Ann Shields appealed this decision, which was affirmed by the Supreme Court. Thereafter, an order was entered December 18, 1973 directing the bank to pay over the proceeds of the account to the Estate of Rickey Dale Shields, which was done January 3, 1974.

8. The Supreme Court in its Opinion noted that:

> "No survivorship provision appears on the face of the passbook introduced into evidence and no other evidence was adduced at trial which indicated that the account contract included a survivorship agreement." Shields v. U.S. National Bank and Shields, 266 Or 562, at page 2.

The court held that the evidence at

trial was sufficient to establish that Marjorie Shields was not intended to have a beneficial interest in the account.

9. Marjorie Shields then sued her attorney in the bank case, alleging that he was negligent in failing to put into evidence the original account agreement and signature card, and the inheritance tax report filed by Lola Shields as personal representative. Expert testimony was offered by both parties in that case as to whether such evidence would have affected the decision of the Supreme Court. The jury returned a verdict for the defendant, which was affirmed by the Supreme Court. Shields v. Campbell, 277 Or 71 (1977)

10. Plaintiff filed this action June 19, 1978, against the bank alleging breach of contract in failing to pay over the proceeds of the bank account to her as

demanded January 9, 1970. Plaintiff Marjorie Shields did not have the passbook, and there is no evidence that the bank improperly refrained from paying over the proceeds in its absence, and with a contrary claim to ownership being asserted by the possessor of the passbook. Thereafter, the ownership of that account was before the court in the first Shields case, and the bank was restrained from making the distribution demanded. When the bank did distribute the proceeds, its action was pursuant to an express order of the Circuit Court.

11. The effect of the first case was to determine the ownership of the bank account as between the plaintiff herein, Marjorie Shields, Lola Shields as personal representative of the estate, and the defendant bank. Plaintiff's contention that her right to the proceeds of the

account was not adjudicated because certain evidence was not presented to the trial court cannot be employed as a collateral attack upon that judgment. She was represented by counsel, had an opportunity to obtain discovery, and to put all such material in evidence if she had chosen to do so. In the second case in which she sued her attorney for failure to do this, a verdict for the defendant was affirmed by the Supreme Court.

12. With respect to plaintiff's contention that the defendant bank is estopped from asserting the defense of res judicata because the bank failed to introduce the evidence referred to, there is nothing to suggest that the bank in any way prevented either of the active parties to that case from discovery or that it objected to such evidence at the trial. The bank was prepared to abide

the decision of the court as to the contenders for the fund and had no duty to try their case for them.

For these reasons, I find that plaintiff's claim is barred by prior litigation and defendant is entitled to summary judgment.

Pursuant to the trial court's opinion, there issued on October 18, 1979 the following judgment:

IN THE CIRCUIT COURT OF OREGON

FOR MULTNOMAH COUNTY

MARJORIE ANN SHIELDS, Plaintiff, v. UNITED STATES NATIONAL BANK OF OREGON, Defendant.	No: A7806-09923 JUDGMENT

Defendant's motion for summary judgment having been granted,

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that Plaintiff take nothing against defendant, and that this action be and the same hereby is dismissed as against the Defendant, and that Defendant is hereby granted judgment against the Plaintiff for its attorneys' fees in the amount of $2,330.00 and for its costs and disbursements incurred

herein, taxed in the amount of $40.90.

JUDGMENT OF AFFIRMANCE

BE IT REMEMBERED that in the COURT OF APPEALS of the State of Oregon, in the City of Salem, on the 30th day of June, 1980, the following proceedings were had:

MARJORIE ANN SHIELDS, Appellant, v. U.S. NATIONAL BANK OF OREGON, Respondent.	Appeal from MULTNOMAH County No. A7806-09923 CA#16117

The cause was affirmed without opinion.

ORDER DENYING REVIEW

BE IT REMEMBERED that in the SUPREME COURT of the State of Oregon, in the city of Salem, on the 3rd day of September, 1980, the following proceedings were had:

MARJORIE ANN SHIELDS, Appellant, v. U.S. NATIONAL BANK OF OREGON, Respondent.	)	Appeal from the COURT OF APPEALS No.16117

The court having duly considered appellant's Petition for Review, and the court being fully advised therein,

IT HEREBY IS ORDERED that said petition be and the same hereby is denied.

IN THE CIRCUIT COURT OF OREGON

FOR MULTNOMAH COUNTY

LOLA SHIELDS, Personal Representative of the Estate of Ricky Dale Shields, Plaintiff, v. UNITED STATES NATIONAL BANK OF OREGON and MARJORIE ANN SHIELDS, Defendants.	No. 377-353 PRIOR FINDINGS, CONCLUSIONS AND JUDGMENT

This matter came on for trial before the undersigned judge of the above-entitled court on the 13th day of October, 1972; plaintiff appeared in person and by Gerald R. Pullen, her attorney; the defendant United States National Bank of Oregon was represented by Milton Stewart, attorney, and the defendant Marjorie Ann Shields appeared in person and by Howard H. Campbell, her attorney; evidence was introduced by the plaintiff and by the

defendant Marjorie Ann Shields and all parties having rested and the court having been fully advised, now make the following

FINDINGS OF FACT

1. The savings account No. 49755-2 at the United States National Bank of Oregon (Peninsula Branch) was opened on August 3, 1953, when Rickie Dale Shields was 11 years of age. He died January 4, 1970, and at that date the account approximated the sum of $15,287.48.

2. When the account was first opened, it was opened under the following names: Rickie Dale Shields or Marjorie Ann Shields. No change was ever made in this registration. Marjorie Ann Shields is Rickie Dale Shields' mother.

3. Rickie Dale Shields was born November 21, 1941; he was married to the plaintiff Lola Shields on November 25, 1961, and she bore him two children.

After he died on January 4, 1970, the plaintiff was appointed his personal representative.

4. Since the account was first opened all funds therein were the sole property of Rickie Dale Shields, and until his death no one contended to the contrary, nor do they now.

5. The defendant Bank makes no claim upon the funds and contends that it holds the same subject to a restraining order of this court, and it is ready, willing and able to pay the sum as directed by the court.

6. The defendant Marjorie Ann Shields claims the fund as a trustee for the benefit of the minor children of her son Rickie Dale Shields. No such trust was ever pleaded by the defendant, nor was any proved.

7. The plaintiff claims the funds

as personal representative of the estate of Rickie Dale Shields. Her capacity as such is admitted.

BASED UPON THE ABOVE FINDINGS OF FACT, the court enters the following

JUDGMENT

1. The estate of Rickie Dale Shields is the owner of savings account No. 49755-2 of the United States National Bank of Oregon (Peninsula Branch) in the name of Rickie Dale Shields or Marjorie Ann Shields.

2. That Marjorie Ann Shields has no interest in the above described account.

3. That the plaintiff herein is entitled to recover costs and disbursements against the defendant Marjorie Ann Shields only, and these costs and disbursements are taxed at $67.80.

4. Defendant Marjorie Ann Shields' cross-complaint is dismissed with pre-

judice and without costs.

5. The order of this court dated February 14, 1972, and signed by the Honorable William M. Dale shall continue to be effective until such time as defendant Marjorie Ann Shields' time for appeal has expired. If no such appeal has been taken within the time allowed by law, the United States National Bank of Oregon shall pay the total balance of the savings account described herein to the personal representative of the estate of Rickie Dale Shields upon order of the Probate Court of Multnomah County. If an appeal is taken by the defendant Marjorie Ann Shields within the time allowed by law, the aforesaid order shall continue in effect until further order of this court.

EXCERPT FROM THE TRANSCRIPT
OF THE PRIOR ACTION

recording the proceedings at trial on October 13, 1972, pages two through four:

THE COURT: Are the parties ready for the trial in the case of Lola Shields v. U.S. National Bank and Marjorie Ann Shields?

MR. PULLEN: The plaintiff is ready, Your Honor.

MR. CAMPBELL: Defendant Marjorie Ann Shields is ready, Your Honor.

THE COURT: Very well, First of all, Mr. Stewart, you're representing the U. S. National Bank?

MR. STEWART: That's correct, Your Honor.

THE COURT: And you're asking leave of the Court to not attend this session this afternoon?

MR. STEWART: That's correct, Your

Honor. Based on the following understanding among the parties: that the United States National Bank claims no interest in the monies which are the subject of this lawsuit. That no party makes monetary claim against the bank in this lawsuit. Further, the bank need not appear and will hold the funds and dispose of them in accordance with this Court's order or any order of any subsequent Appellate Court. Finally, no default will be taken against the United States National Bank without opportunity to be heard.

THE COURT: Now, the bank is aware of the Court's prior order---restraining order in this matter dated February 14, 1972, and signed by Judge Dale?

MR. STEWART: It is, Your Honor.

THE COURT: Very well.

MR. CAMPBELL: Your Honor, as I

advised the Court, Mrs. Shields feels strongly that the U.S. National Bank should join in enforcing the law of joint bank accounts and so she is not in a position to voluntarily agree to let the bank off.

THE COURT: Very well.

MR. PULLEN: For the plaintiff, we are certainly willing to let the bank out of defending this case on the principle that they are only a neutral stakeholder have no axe to grind, and we'll abide by the court's order as to the disposition of this fund.

THE COURT: Very well. The court feels that it's the bank's business whether it wants to have an attorney attend this trial or not and if you have no desire to attend this trial, Mr. Stewart, you may be excused.

Name SHIELDS, RICKIE DALE & MARJORIE ANN

Dep Apr 4-70

NO. 49755

JOINT ACCOUNT

Undersigned agree with each other and with The United States National Bank of Portland (Oregon), irrevocably except by joint written notice filed with Bank, as to this JOINT ACCOUNT:

(1) All transactions are governed by contract on Bank's forms, including savings passbook rules if applicable, and account is subject to Bank's service charges existing at any time.

(2) Deposits credited to this account are payable by Bank to or upon the order of any of undersigned or to the survivor, and upon death shall belong to the survivor, but payable only upon compliance with legal requirements. Without consent of any other, any of undersigned may withdraw funds from this account or transfer such funds in whole or in part to such undersigned's individual account or in payment of such undersigned's individual obligations, and all interest of all others of undersigned shall to that extent be divested and Bank released thereby, without reference to original ownership of the moneys deposited. Undersigned authorize the signatures below in transactions affecting account and authorize each other to endorse and deposit in this account checks and other items payable to any of undersigned. Deposits received for credit to this account or for account of any of undersigned may be credited to this account though temporarily closed, subject to all terms hereof, unless otherwise directed.

(3) Undersigned shall be jointly and severally liable to Bank for any overdraft by or overpayment to any of undersigned, due to mistake or otherwise, and if action is brought to recover the same undersigned will pay also such sum as the court may adjudge reasonable as attorneys' fees in such action. Upon service of notice of garnishment, injunction or other court order upon Bank relative to property of any of undersigned, Bank may proceed as though this account were the sole property of undersigned named in such legal document. CUSTOMER'S CONTRACT

Dated AUG 3 53, 19

Rickie Dale Shields

Marjorie Ann Shields

[illegible]